No. 120.

FILED
NOV 14 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Jackson & Jackson for D.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Filed Nov. 14, 1902.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased,
Plaintiff in Error;

vs.

ANNA O. PARK, successor in interest and substituted for RICHARD A. PARK, deceased,
Defendant in Error.

No. 120.

MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM, AND STATEMENT OF CASE, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR THEREON.

JACKSON & JACKSON,
Attorneys for Defendant in Error.

THE HOME PRINTING CO., ATCHISON, KANSAS.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased, *Plaintiff in Error*: vs. ANNA O. PARK, successor in interest and substituted for RICHARD A. PARK, deceased, *Defendant in Error.*	No. 120.

MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM, AND STATEMENT OF CASE, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR THEREON.

Preliminary to such motion the motion of Anna O. Park to be substituted as defendant in error is submitted.

Since the record was filed in this court, Anna O. Park, as successor in interest of Richard A. Park, deceased, by transfer of the interest of the original plaintiff during the pending of the suit, has filed suggestion of his death and motion to be substituted as defendant in error, un-

der the following provisions of the statutes of Kansas, to-wit:

"Ch. 80, Sec. 40. An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of the party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action," and the decision in Warner v. Hatton, 54 Kan., 250.

The statutory liability of stockholders in Kansas is contractural.

Elevator Co. v. Whitbeck, 63 Kan., 102;

Woodworth v. Bolls, 61 Kan, 569; 582;

Whitman v. National Bk. of Oxford, 176 U. S., 559,

and an action upon such liability survives at common law and under G. S. Kansas, 1901, par. 4869.

Richmond v. Irons, 121 U. S., 27.

Such suggestion and motion of such assignee and successor in interest will therefore be sustained, and she will be substituted as defendant in error.

On August 26, 1902, there was filed the following motion to dismiss or affirm:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased, *Plaintiff in Error*; vs. ANNA O. PARK, successor in interest and substituted for RICHARD A. PARK, deceased, *Defendant in Error.*	No. 120.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant in error, Anna O. Park, successor in interest of and substituted for Richard A. Park, by Horace M. Jackson, her counsel, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment, from which the said writ of error purports to have been taken, is the judgment of the Supreme Court

of one of the United States, to wit: The Supreme Court of the State of Kansas; and because, from the statement of this case made by the Supreme Court of Kansas in its opinion, and the judgment and decision therein, it is manifest that no Federal question was passed upon by that court, and that its decision and judgment was based upon local statutes involving no Federal question, and which local statute was, of itself, sufficient to support the judgment and decision of the Supreme Court of the State of Kansas, and because the decision of the Supreme Court of the State of Kansas was based solely upon a proposition of law therein involved, to wit: That a former decision in said cause and between said parties was an adjudication of the questions presented and involved, and concluded the plaintiff in error in the case in which the said decision of the Supreme Court of Kansas was rendered, and from which decision petition in error in this cause has been issued to said Supreme Court of the United States.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said judgment from which said writ of error purports to have been taken, because, although the record in said cause may show that this court has jurisdiction in the premises, it is manifest that the said appeal was taken for delay only.

HORACE M. JACKSON,
Counsel for Defendant in Error.

STATEMENT OF CASE.

This action was originally commenced by attachment in the District Court of Atchison County, Kansas, to recover of the non-resident executor of the estate of George Manley, deceased, upon his liability as a stockholder of The Kansas Trust and Banking Company as provided by the constitution of the State of Kansas and legislation thereunder. Record, p. 5.

Pending such action the then executor of said estate resigned and was succeeded by the plaintiff in error, who was duly substituted as defendant therein. Record, p. 21.

Upon answer (record, p. 22) and reply (record, p. 25) trial was had, and, on December 15th, 1897, judgment rendered in favor of defendant in error for the sum of $2463.07, and attached property ordered sold to satisfy the same. Record, p. 29.

Proceedings in error were commenced in the Supreme Court of the State of Kansas to review such judgment and dismissed and mandate of dismissal filed in such District Court December 12th, 1899. Record, p. 34.

No Federal question was presented until after such final judgment of the Supremt Court.

Upon such judgment and mandate, order for sale of the land attached was duly issued from

the District Court and levied, when plaintiff in error filed in that court his motions to set aside said judgment (record, p. 35), and for the withdrawal of said order of sale. Record, p. 37.

The same grounds were stated in both such motions, and then for the first time a Federal question was raised or attempted to be raised by the claim therein that Section 203 of the Executors and Administrators Act of the State of Kansas, under which such action and attachment were prosecuted, violated Sections 1 and 2, Article 4, and the 14th Amendment of the Constitution of the United States and also Section 27 of the Act of Congress creating the Territory of Kansas. Upon the trial of such motions in the District Court the only evidence offered was the record on the original trial and judgment therein. Such motions were overruled solely upon the ground that under the constitution and laws of Kansas the trial court in the original trial had jurisdiction of the parties and subject matter; that the judgment therein was final, and concluded the plaintiff in error against the relief sought by such motions; that he could not reopen the case and, by supplemental motions, make a further defense which he could have made on the original trial or urge any question necessarily involved therein.

From such judgment plaintiff in error again proceeded in the State Supreme Court, which court affirmed the judgment of the District

Court solely upon the ground of *res adjudicata* and estoppel as fully appears from the syllabus, statement and opinion. Record, pp. 42-49.

From such judgment of affirmance petition in error was allowed to this court and it clearly appears therefrom that no Federal question was involved or decided; that the only question presented, considered or decided was that under the general law and statutes of Kansas, the original judgment was a complete bar to relief upon such motions.

POINTS OF LAW.

The attempt to raise the claimed Federal question was made too late.

It was made after the final decision and on supplementary motions presented after the first appeal. Such delay precludes a review by this court.

Scudder v. Coler, 175 U. S., 32-36, and cases cited.

When first raised on petition for rehearing it is too late.

Turner v. Richardson, 180 U. S., 87-92.

Boston B. & L. Asso. v. Welling, 181 U. S., 47.

Meyer v. Richmond, 172 U. S., 82-92.

When raised on second appeal it is too late.

Yazoo M. V. R. Co. v. Adams, 180 U. S., 1-7, and cases cited.

Union Mu. L. Ins. Co. v. Kirchoff, 169 U. S., 103.

No Federal question was decided or necessary to the decision made.

A definite issue as to the validity of the statute must be distinctly deducible from the record before it can be held that a Federal question was disposed of by the decision.

Powell v. Supervisors of Brunswick Co., 150 U. S., 433.

Such case is directly in point. In that, as in this, plaintiff in error, as defendant, nowhere claimed in the original action any privilege or immunity under the Constitution of the United States, nor suggested any Federal question, but in a supplemental proceeding by brief, as in this case by motions, it was urged that the Act giving the District Court jurisdiction was in conflict with the Constitution of the United States, and the State Court only decided that the District Court had jurisdiction of the original case, and had jurisdiction to decide incorrectly as well as correctly, and that such decision was a final and conclusive determination of the rights of the parties which could not be questioned except by appeal within the time and in the manner provided by law.

To authorize the review of a state judgment it must appear that the decision of a Federal question was necessary to the determination of the case and was actually decided.

Kans. End. & Ben. Assn. v. Kansas, 120 U. S., 103.

Church v. Kelsey, 121 U. S., 282.

Clark v. Pa., 128 U. S., 395.

N. O. Waterworks Co. v. La. Sugar Refining Co., 125 U. S., 18.

To give this court jurisdictian of a writ of error it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, or was decided, or that the judgment as rendered could not have been rendered without deciding it.

Eustice v. Bolles, 150 U. S., 361.

Cook v. Chicago & C. Canal & Dock Co., 138 U. S., 635.

Klinger v. State of Missouri, 80 U. S., 257-263.

Jenkins v. Lowenthal, *et al.*, 110 U. S., 222.

Egan v. Hart, 165 U. S., 188.

Rafael M. Del Costillo v. McConnico, 168 U. S., 674-679.

The decision was clearly upon grounds other than a Federal question and this court has no jurisdiction.

Even though a Federal question was presented and decided this court will not entertain jurisdiction of state judgment if besides the Federal question decided by the State Court, there is another and distinct ground on which the judgment can be sustained.

The Kennebeck & Portland Rld. Co., v. The Portland & Kennebeck Rld. Co., 81 U. S., 23.

Rector v. Ashley, 73 U. S., 142.

Gibson v. Christian, 75 U. S., 314.

Johnson v. Risk, 137 U. S., 300.

Hopkins v. McLure, 133 U. S., 380.

Hale v. Akers, 132 U. S., 554.

Hale v. Lewis, 181 U. S., 473.

N. Y. C. & H. R. Rld. Co. v. City of New York, No. 234, October Term, 1901—Advance Sheets, Lawyers' Ed., p. 916.

When the State Court has rendered its decision on a local or state question or a general law, the logical course for this court is to dismiss the writ of error.

St. L. G. & F. S. Ry. Co. vs. The State of Missouri, 156 U. S., 478.

A decision of a State Court based on estoppel involves no Federal question.

Weyerhausser v. State of Minnesota, 176 U. S., 550-559.

Nor when based on laches.

Pittsburg & Lake Angeline Iron Co. v. Cleveland Iron Mining Co., 178 U. S., 270-280.

Mran v. Horsky, 178 U. S., 205-215.

The decision of the State Court having been upon the state statute and general law, and being sustained thereby, this court will not review the decision, even though there was an attempt to raise a Federal question.

Eustice v. Bolles, 150 U. S., 361, *supra*.

De Saussure v. Gaillard, 127 U. S., 210.

No Federal question having been raised in the original case; the appeal therefrom having been dismissed; the attempt to raise the Federal question having been first made after the first appeal and by collateral motions; the judgment of the State Court having been upon a state statute and general law to support which, the decision of the Federal question was wholly unnecessary, it follows that the claimed Federal question was not raised in time, was not decided by the State Court, is not involved in the case and that this court is without jurisdiction and the cause should be dismissed and we respectfully ask that it be so ordered.

POINTS UPON THE MERITS.

Upon the merits of the case, we suggest the following as the errors suggested and the points and authorities therein and refer to the quite full statement of the case heretofore made, and which was so made for the purpose of avoiding a repetition in submitting the merits.

The assignment of errors made is a mixed statement of facts and of law.

Separating the statement of facts from the propositions of law the errors assigned are as follows:

1. That the District Court of Atchison County, Kansas, had no jurisdiction to entertain the suit or render judgment therein.

2. That said court had no jurisdiction to order the sale of the property attached to satisfy the judgment.

3. That said action was a suit against the executors of an estate and, under the constitution and the laws of the State of Kansas, the Probate Court of Atchison County, Kansas, and not the District Court of said county, had jurisdiction to entertain the claim of the plaintiff.

4. That no attachment could legally issue against the property of the defendant executor.

5. That the original judgment was void, because the District Court thereby ordered the sale of the property of a dead man.

6. That the said District Court in rendering said judgment and ordering sale of attached property, did not give full faith and credit to the public acts and judicial proceedings of the Surrogate of the Orphans Court of Union County, New Jersey, where the estate of George Manley, deceased, was being administered, in violation and disregard of Section 1, Art. 4 of the Constitution of the United States.

7. That said court did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by Sec. 2, Art. 4 of the Constitution of the United States.

8. That said District Court by said judgment abridged the privileges of the defendant and deprived him of his property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

9. That the Supreme Court of the State of Kansas erred in affirming the said decision and judgment of the District Court of Atchison County.

10. That said Supreme Court of the State of Kansas erred in that by its judgment and decision it adjudged and determined that the original judgment of said District Court, rendered on December 15, 1897, concluded the plaintiff in error herein.

11. That said Supreme Court erred as stated in the last assignment of error, because said judgment was void on its face for the reasons stated in the previous assignments of error herein designated.

While the specifications of error made by plaintiff in error are not in terms or numbered as above stated, nevertheless, we have carefully analyzed and succinctly stated the points and legal propositions made and claimed in such assignment of errors.

Of the errors so generally assigned, the first four depend entirely upon the construction of the constitution and laws of the State of Kansas and may be considered together. They rest upon the claimed want of jurisdiction of the District Court as fixed by the constitution and statutes of the state.

The action was to recover from the defendant below, plaintiff in error, and was upon a contract.

The liability of a stockholder is contractural.

Woodworth v. Bowles, 61 Kan., 569, *supra*.

Elevator Co. v. Whitbeck, 63 Kan. 102, *supra*.

Evans v. Nevis, (C. C. New York) 101 Fed. 920.

Richmond v. Irons, 121 U. S. 27, *supra*.

Whitman v. Nat'l Bank, 176 U. S., 559.

Hathorn v. Calef, 69 U. S., 10.

The District Court had jurisdiction.

The constitution and statute of Kansas provides:

Constitution, Art. 3, Sec. 6. "The district court shall have such jurisdiction in their respective districts as may be provided by law," and the statute (G. S. 1901) provides:

Sec. 1923. "There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have general jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal."

Sec. 3009. "An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in the capacity as executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

And in the code of civil procedure:

Sec. 4624. "The plaintiff in a civil action for a recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

First, when the defendant or one of several defendants, is a foreign corporation, or a non-resident of this state."

The claim that the Probate Court had jurisdiction of this case is not sustained as appears from the jurisdiction so given to the District Court and the following provisions of the constitution and statute of that state.

Constitution. Art. 3. Sec. 8. "There shall be a Probate Court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law."

And the statute, so far as relates to this case, is as follows:

Sec. 1974. "The Probate Courts shall be courts of record, and, within their respective counties, shall have jurisdiction; first, to take the proof of last wills and testaments, and admit them to probate, and to admit to record authenticated copies of last wills and testaments executed, proved and admitted to pro-

bate in the courts of any other state, territory or county.

Second, to grant and revoke letters testamentary and of administration.

Third, to direct and control the official acts of executors and administrators, settle their accounts, and order the distribution of estates;

. . . . . .

Seventh, *to have and exercise the jurisdiction and authority provided by law respecting executors and administrators, and the settlement of the estates of deceased persons.*"

"Sec. 2833. Letters testamentary and of administration shall *in no case be granted to a non-resident of this state;* and when an executor or administrator shall become a non-resident, the Probate Court having jurisdiction of the estate of the testator or intestate of such executor or administrator, shall revoke his letters."

By such provisions of the constitution and statutes, jurisdiction of suits *by and against non-resident executors and administrators* is expressly given to the District Courts, while jurisdiction respecting resident executors and administrators appointed by Probate Courts is given to the Probate Court, but the Probate Court is denied jurisdiction over non-resident executors and administrators and such jurisdiction is, by said Sec. 3009, expressly given to the District Courts.

The Probate Court did not have jurisdiction.

Ewing v. Mallison, Sup. Ct., Kan., Oct. 11, 1902. 70 Pac ——.

If the District Court had jurisdiction of actions of the same general nature, that is, of actions to recover upon a contractural liability and against non-residents having property within the jurisdiction of the court which could be attached, then such court had jurisdiction of this case.

Jurisdiction of cases of a general class gives jurisdiction of the subject matter of a case which belongs to such class.

Cooley on Const. Lim. (2 Ed.) 398.

Wells on Jurisdiction. Secs. 3, 4.

Brown on Jurisdiction. Sec. 1A.

United States v. Arredondo, *et al.*, 6 Peter 691, at 709, where it is said "The power to hear and determine a cause is jurisdiction."

Florentine v. Barton, 69 U. S., at 216.

Cooper v. Reynolds, 77 U. S., 308-316.

12 Enc. P. & P., 121, Note 1 and citations.

Hallock v. Downing, 69 N. Y., at 240.

Hunt v. Hunt, 72 N. Y., 229.

Fithian v. Monks, 43 Mo., 502.

See also decision of the Supreme Court in this case. 62 Kan., 559.

The judgment on the original trial concluded the defendant below, plaintiff in error, in the state court and in this court.

The judgment in the original case was affirmed by the dismissal of the first appeal and such decision became the law of the case for all purposes and was not open for re-consideration.

Headley v. Challiss, 15 Kan., 602.

Rld. Co. v. Shoup, 28 Kan., 394.

Crockett v. Gray, 31 Kan., 346.

Norton v. Huntoon, 43 Kan., 275.

Florentine v. Barton, 69 U. S., 210, *supra*.

United States v. Camou, decided by this court at last term and reported Advance Sheets, Lawyers' Ed., 1902, pp. 505-6.

Illinois *ex rel* Hunt, v. Ill. Cent. Rld. Co., decided by this court at the last term reported Lawyers' Ed. advanced sheet, p. 300.

Board of Children's Guardians v. Shutter, 139 Ind., 263.

The District Court construed the Constitution and sustained the statute and this court considers itself bound by the construction and validity of the state, constitution and statute, when given by courts of last resort of the state.

Burgess v. Seligman, 107 U. S., 20.—6th syll.

Florentine v. Barton, (Opinion) 69 U. S., 210, at 216, *supra.*

South Ottawa v. Ottawa, 94 U. S., 260-268.

Atlantic & G. Rld. Co. v. Georgia, 98 U. S., 359.

Dunkin v. McCall, sheriff, 139 U. S., 449.

Post v. Kendall Co., Supervisors, 105 U. S., 667.

Clark v. Clark, 178 U. S., 186.

Abraham v. Casey, 179 U. S., 210.

Such statute giving the District Court jurisdiction in suits against non-resident executors and administrators, by attachment and otherwise, was enacted in 1868 and is sustained by a long line of decisions as follows:

Cady v. Bard et al, exrs. 21 Kan. 667.

Opinion by Mr. Justice Brewer, who said "Now a non-resident may be sued in an action on a contract for the recovery of money, and service may be obtained by attachment and publication. 'In like manner', may a foreign executor or administrator be sued. That a state has jurisdiction over all property within its limits and may subject it to the process of its courts, will not be doubted. * * * * * * * It is enough for the purpose of this case to hold that jurisdiction may be acquired so far as may be necessary to cut off all interest of the non-resident defendant in the property attached."

Denny v. Faulkner, 22 Kan., 89 at 96.

Ravenscraft v. Pratt, 22 Kan., 20, at 25.

Dunlap v. McFarland, Admr, 25 Kan., 488.

Donifelser v. Heyl, 7 App. 606, affirmed in Heyl v. Donifelser, 59 Kan., 779.

Eells, admr. v. Holden, 2 McCrary 622 in which McCrary, circuit judge, said: "Under Sec. 2491 (Sec. 3009 above quoted) compiled laws of Kansas, an executor or administrator appointed in another state may sue in Kansas in like manner and under like restrictions as a non-resident may sue. The decisions of the Supreme

Court of the state construing and applying its attachment laws control."

The defendant below (plaintiff in error) personally appeared and the District Court thereby acquired jurisdiction of the person of defendant.

Frazier v. Douglas, 57 Kan., 809.

Packing Co. v. Casing Co., 34 Kan., 340.

Burdette v. Corgan, 26 Kan., 102.

Kaw Life Assoc. v. Lemke, 40 Kan., 142.

Burnham v. Lewis, Oct. 11, 1902. 70 Pac.—

It has not been contended by plaintiff in error that such District Courts did not have jurisdiction in cases of the same general nature by attachment against non-residents other than non-resident executors and administrators, but it is claimed that as to them such Sec. 203 is in conflict with the Constitution of the United States and therefore void, and for that reason the District Court was without jurisdiction of the cause.

The validity of such law was necessarily involved in the original trial of the case, was then decided by the court, and its judgment a complete adjudication.

Florentine v. Barton, 69 U. S., 210, *supra*.

Board, etc., v. Shutler, 139 Ind., 263, *supra*.

The court having had jurisdiction of the person and of the subject matter, the original judgment rendered thereby was final and conclusive even though the statute upon which such judgment was rendered was afterwards adjudged to be unconstitutional.

Marbury v. Madison, 1 Cranch, 177.

Webster v. Reid, 1 Morris (Ia.), at 632.

(Plaintiff in error has claimed that this rule was reversed by this court in Reid v. Webster, 11 How., 437. This *rule* was not reversed, but this court held that the trial court did not have jurisdiction of the person of the defendant and the case was reversed for that reason.)

Wells Jurisdiction of Court. Sec. 6.

United States v. Knox Co., 122 U. S., 306.

The unconstitutionality of the statute could not be considered on a second appeal.

Northern Pac. Co. v. Ellis, 144 U. S., 458.

In U. S. v. Throckmorton, 98 U. S., 61

the court said: "If the court has been mistaken in the law there is a remedy by writ of error."

In Ellis v. Northern Pac. Ry. Co., 45 N. W., 811.

Same case 50 N. W., 397.

Same case 144 U. S., 458, *supra*,

the Wisconsin Court had rendered a judgment upon and sustained a law which was afterwards held to be unconstitutional and such latter decision was urged against the validity of the first judgment but in the latter case it was held the first judgment was conclusive notwithstanding the law under which it was rendered was void.

In Florentine v. Barton, 69 U. S., 210, *supra*, The validity of an Illinois statute and a judgment based thereon was involved and it was held that "whether the decision was correct or otherwise, its judgment, until reversed, is binding on every other court."

In Barrell v. Tilton, 119 U. S., 637, it was urged that the prior judgment therein attacked was void as having been rendered under an unconstitutional law of Oregon, but the court

said: "The objection, however, is entirely disposed of by the decree of the state court."

In Board of Children's Guardians, etc. vs. Shutter, 139 Ind., 368, *supra*, the court said: "A judgment founded on a statutory bond depending for its validity wholly on the statute which is unconstitutional and void, is not void and cannot be impeached because the statute is unconstitutional and void," and thereon declined to discuss the constitutionality of such statute.

In Arnold v. Dunn, 5 Dana, 18, the action was upon a Kentucky statute clearly in conflict with the Federal constitution, judgment rendered supporting the statute, which judgment was subsequently attacked, and therein the court, as to cases cited and relied upon and in accord of the contention of defendant in error herein, said: "The principle of those cases is applicable to this, and, when applied, leads to the conclusion that the magistrate having jurisdiction over the subject matter and the man had a right to decide whether the penalties sued for were legally recoverable, or, in other words, whether the statute under which it was claimed was valid or void; and if the statute be unconstitutional, that fact does not show that the magistrate had no jurisdiction over the suit, but would prove only that his judgment was erroneous."

In Howard v. Huron, 26 L. R. A. 493 at

499, the validity of the original judgment was attacked because it was confessedly upon a claim void as in conflict with the constitution, and it was held that notwithstanding such admission the judgment was valid, no appeal having been taken therefrom. It was conceded in such case that had the constitutional limitation of the indebtedness been applied in the original trial, it would have prevented the judgment which was then being assailed.

In Cooper v. Reynolds, 77 U. S., 308, it is said that errors are of no avail "unless they be such as to prove that the court had no jurisdiction."

In Chicago & Alton Rld. Co. v. Wiggins Ferry Co., 108 U. S. 18, it was held that a state judgment could not be impeached collaterally in the courts of the United States by showing that if due effect had been given to the laws it would have been the other way.

The dismissal of the original case by the Supreme Court did not change the rule as to the effect of the original judgment.

Wells on Res. Adj. Sec. 9.

The claim of error based upon the order of sale of the property of a dead man is not sustained by the record.

The property attached had been owned by George Manley, afterwards deceased, but at the time of the attachment the title thereto was held by and in the name of the executor of deceased and it was the property and interest of the executor not the deceased which was ordered sold.

The judgment of the court is conclusive as to the validity of the order of sale.

Further errors are assigned based upon the claim that the rights of the plaintiff in error, guaranteed by the Constitution of the United States, were denied by the State Court.

As to such claimed errors, we suggest the following propositions and authorities as though the questions had been timely presented to and in fact involved in and decided by the State Court:

There was no failure to give full faith and credit to the judicial proceedings of the Orphans' Court of New Jersey.

The claim that in rendering the original judgment the court failed to give full faith and credit is not sustained by the record. The Orphans' Court had jurisdiction to probate the will, appoint the resident executor and, so far as related to the property of the estate of George Manley within the state of New Jersey, it had jurisdiction.

The District Court fully recognizes such jurisdiction and gave its proceedings full faith and credit by the recognition of the will and of the order appointing the executors, and the suit was prosecuted against such executors so appointed and full recognition was thereby given to the proceedings of each court.

The State of Kansas had jurisdiction over all the property in the charge of such executors which was within the State of Kansas and had the right to subject it to the process of its courts and to fix the rules enforcing its descent, alienation and transfer, and to determine the effect and construction of wills and conveyances. The laws of New Jersey could not affect the transfer of property in Kansas.

Clark v. Clark, 178 U. S., 186-191.

Brine v. Hartford Ins. Co., 96 U. S., 627.

McGoon v. Scales, 76 U. S. 23 at 30, in which Mr. Justice Miller, speaking for the court, said: "There can be no question of the right of the legislature of the State of Wisconsin to pass such laws as will subject property in her territory, held and owned by non-residents, to the payment of the debt of such owners; and the manner of doing this is also entirely within the legislative control, provided it does not violate some of the provisions of the Federal or State Constitution."

Clark v. Graham, 6 Wheat, 577.

United States v. Crosby, 7 Cranch, 115.

If the New Jersey legislature, through the courts of that state, could exercise jurisdiction over and control the disposition of real property within the State of Kansas, equally so could every other state of the Union.

The conflict of the laws as to the transfer of property in different states which would result from the construction urged, proves the absurdity of the proposition claimed by plaintiff in error.

Cooper v. Ives, 62 Kan., 395 at 399.

Carpenter v. Strange, 141 U. S., 87 at 105.

Arndt v. Griggs, 134 U. S., 316.

In Paul v. Virginia, 75 U. S., 168, opinion, it was held that the laws of one state could have no operation in another state except by consent of such other state.

In Smith v. Union Bank, 5 Peters, at 526, it is said: "The obligation of the sovereign to enforce his own laws and protect his own subjects is acknowledged to be paramount."

In Burkhim v. Pinkhusson, (S. C.,) 36 S. E., 908-9;

auxiliary letters of administration were issued in South Carolina and it was claimed that that was a refusal to give full faith and credit to the judicial proceedings in the Florida Court which had granted primary letters, and it was said:

"We are unable to discover from the 'case' anything tending to show that Section 1, Article 4, of the Constitution of the United States, requiring that 'full faith and credit be given in each State, to the public acts, records, and judicial proceedings of every other State' has been violated as claimed in the first exception; for there is nothing in the 'case' which shows that the action of the court in Florida appointing Burkhim administrator there, was repudiated, or even disregarded, either by the probate judge or the circuit judge here. The rule that the judgments and decrees of the court of any State have no extra territorial force is too well settled to require the citation of any authority. While, therefore, the action of the court in Florida may have had the effect of investing Burkhim with all the rights and powers

of an administrator in that State, it certainly had no force or effect in this State."

Green v. VanBuskirk, 72 U. S., 307.

Hervey v. Rhode Island Loc. Works, 93 U. S., 604.

There was no failure to accord the defendant below as a citizen of New Jersey nor as a citizen of the United States any privilege or immunity, under either Article 4, Section 2 or the Fourteenth Amendment of the United States Constitution.

The plaintiff in error was sued *as an executor* and as such prosecutes this writ of error. As executor he could not claim the privilege or immunity which is accorded to or claimed by either a natural person or an executor appointed by the courts of Kansas and acting as such under its laws.

Mr. Justice Miller in his lectures on the Constitution, page 293, says that "citizens" as there used means "those who have the right of marriage, the right to the control of children; natural persons who owe allegiance to the government." Such term does not include corpor-

ations, officers or trustees created or appointed by or under the laws of other states, for if it be conceded that a right, privilege or authority is conferred upon such officer, by the laws of such other state and such rights are accorded to him in and by a sister state, or enforced by this court it has the effect to extend the laws of the state by which he is appointed or acquires authority, beyond the boundaries of such state and into the states where he may assume to act as such officer.

In Paul v. Virginia, 75 U. S., 357, the court said "The term citizen, as there used, (referring to the Constitution), applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."

In Ins. Co. v. Franch, 18 How., U. S., 404, the court said: "This court does not hold that either a voluntary association of persons or an association into a body politic created by law is a citizen of a state within the meaning of the constitution."

Lemon v. People, 20 N. Y., 607, quoted with approval in Paul v. Virginia.

In Blake v. McClung, 172 U. S., at 259, the court held that a corporation is a citizen of the state under whose laws it is organized and that, "for the purpose of suits by or against it in the courts;" that it is a person within that clause of the 14th Amendment which provides "that it shall not be deprived of property without due

process of law," and said: "but it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision, that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'"

Pembina etc. Co. v. Pa., 125 U. S., 181.

Norfolk etc. v. Pa., 136 U. S., 114.

Fire Association v. N. Y., 119 U. S., 110.

Ducat v. Chicago, 77 U. S., 410.

Sully v. American National Bank, 178 U. S., 302.

Desty on the Constitution, 233.

Caldwell v. Armour, (Del.) 43 Atl., 517.

Were the privileges or immunities of the defendant below, plaintiff in error, abridged or the equal protection of the law denied to him within the provision of the Fourteenth Amendment of the United States Constitution?

The claim of such wrong is based solely upon the ground that under the laws of Kansas the property of a non-resident executor or administrator could be attached by suit in the District Court and sold, while that of a resident

executor or administrator could only be sold by proceedings in the Probate Court and not then by attachment.

As stated, an executor is not a citizen within the provisions of the Fourteenth Amendment.

As to a non-resident, jurisdiction could not be obtained by service of process beyond the boundaries of the state.

Howell v. Mangelsdorf, 33 Kan., 194.

It follows that unless the property of non-resident executors could be attached and the *res* brought within the jurisdiction of the court, it could not be appropriated to the payment of debts of the estate in charge of such non-resident executor.

If it be claimed that a local administrator might be appointed and claims presented to the Probate Court, and allowed and classified, including the claims presented in the court which granted domiciliary letters, but the local estate would be exhausted in the payment thereof, and if the allowance and classification so made by the court granting domiciliary letters should be denied or not recognized, and the same classification and priority of payment ordered, it would at once be urged that "full faith and credit had not been given to the judgments" allowing and classifying such claims, with the consequent result, if sustained, that

property within the jurisdiction of one state, and which the courts of such state have the right to order applied in payment of the debts due to local creditors, would be administered and applied under the law of another state in which domiciliary administration had been granted. Such was not the purpose or intended effect of the Fourteenth Amendment.

But such statute of Kansas gives to the non-residents the same right to sue as is given to residents. In such respect no distinction is made.

The only distinction is that such statute permits suits to be brought by attachment in the District Court against non-residents, while suits against resident executors can only be commenced in the Probate Court and not by attachment, and such distinction rests solely upon the fact of non-residence, a distinction, which in the very nature of things, must exist and must be recognized and permitted.

Because of such necessary distinction it has been repeatedly held that a state may, by statute authorizing the prosecution of suits, classify residents in one class and non-residents in another, and provide one proceeding in one case, and different proceeding in the other, and when based upon such classification, does not infringe the Fourteenth Amendment.

In Central L. & T. Co. v. Campbell C. Co., 173 U. S., 84, there was involved the validity of the statute of Oklahoma authorizing suits against non-residents by the attachment of their property without bond, but which required bond to be given in like suits against residents, and the claim was made that such statute was void as in violation of the Fourteenth Amendment in that it abridged the privileges and immunities of the citizens of another state and denied non-residents "the equal protection of the laws", and in support of such claim the same argument was presented as in this case. In answer the court said (p. 97):

"III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the territory, it is said, in case of an attachment for the cause stated against a resident of the territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, while it has been construed to make no such requirement in the case of an attachment against a non-resident, this it is argued, is a discrimination against a non-resident, does not afford due process of law and denies the equal protection of the laws." * * * * * *

The argument in substance is that when a bond is required as a prerequisite to the issue of an attachment against a resident, an unlaw-

ful discrimination is produced by permitting process of attachment against a non-resident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing process of attachment against a non-resident and not permitting such proceess against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification, in accordance with the suggestion just made, is conceded, and, if it were not, is obvious. The reasoning, then, is that, although the difference in the two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other."

And thereon the court held that as "the classification depends upon residence and non-residence, and not upon the cause of action, the attempted distinction was without merit," and reversed the decision of the lower court which had been against the constitutionality of such law.

The rule so stated affirms the decision of this court in

Head v. Daniels, 38 Kan., 1, at 9;

Campbell v. Morris, 3 Harr. & McH., 535;

Buffington v. Grosvenor, 46 Kan., at 734.

The transfer of property in Kansas, by testament, death, and appointment of an executor,

all occurring in New Jersey, is not in any legal aspect different from the transfer of like property by assignment, appointment of the assignee and his qualification in New Jersey or in any other state. Either, if occurring in Kansas, would place the property of the testator or assignor beyond the process of attachment. Neither, if occurring in any other state, would place the property beyond the process of a Kansas court having jurisdiction of the subject matter.

In Reynolds v. Adden, 136 U. S., 348 (34 L. Ed. 360), there was involved an attachment in Louisiana of the property of an assignor who had assigned in Massachusetts. Thereon the assignee prosecuted suit in the Federal Court of Louisiana to enjoin such attachment upon the same ground as here urged by plaintiff in error, but which was not sustained, and the court said (p. 362, L. Ed.):

"It is by the laws of Louisiana that the question must be decided. Every state exercises to a greater or less extent, as it deems expedient, the comity of giving effect to insolvent proceedings of other states, except as it may be compelled to give them full effect by the Constitution of the United States. Where the transfer of the debtor's property is the result of a judicial proceeding, as in the present case, there is no provision of the Constitution which requires the courts of another state to carry it into effect; and, as a general rule, no state court will do this to the prejudice of the citizens of its own state."

Nearly if not all the states of the Union provide for suits against non-residents by the attachment of property; and some prohibit suits by non-residents against non-residents, and as said in Robinson v. Ocean Steam Navigation Co., 112 N. Y., 315, (2 L. R. A., at 638),

"A construction of the constitutional limitation which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters."

In such case it was held that while a statute of New York authorized the appointment of a non-resident as an administrator, another statute which prohibited a non-resident from bringing suit in that state and which barred suit by such administrator, was not void as contravening such amendment.

A statute requiring security for costs from non-resident suitors and not requiring it from resident suitors is not void.

Haney v. Marshall, 9 Md., 194.

A statute providing that the limitation shall run in favor of a resident and against a non-resident, but not in favor of a non-resident, is not unconstitutional.

Chemung Canal Bk v. Lowery, 93 U. S., 72.

"Whenever the law operates alike on all

persons and property, similarly situated, equal protection (of the laws) cannot be said to be denied."

Walston v. Nevin, 128 U. S., 578.

Mo. P. R'y Co. v. Mackey, 127 U. S., 205.

"The amendment could never have been intended to prevent a state from arranging and parcelling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Bowman v. Lewis, 101 U. S., 22.

Hayes v. Missouri, 120 U. S., 68.

Plaintiff in error, claiming under the will of a late non-resident testator, while failing to have administration upon the Kansas property of such estate in the State of Kansas, complains that the laws of such state do not protect him while remaining out of that state and refusing to submit himself to the jurisdiction of its courts, which laws, however, give to him as a suitor the same privilege which is given to citizens of Kansas. Such complaint is without reason. The rule is that:

"The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the

authority which confers it may impose conditions upon it."

Magoun v. Ills. Trust & Savgs. Bk., 170 U. S., at 228.

And further (p. 293) commenting on the Fourteenth Amendment the court, after citing and quoting many authorities, said:

"With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the wisdom and discretion of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of the law has it concern. Mr Justice Field said in Mobile County v. Kimball, 102 U. S., 704 (26 L. Ed., 242), that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.' The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. * * * * * * *

"In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The non-resident executor is not denied any right which is given to him. The statute gives the right to the non-resident executor to sue

as well as to be sued "in the same manner and under like restrictions that other non-residents may sue or be sued." It is no objection to the validity of such law that resident executors who are appointed by and act under direction of Probate Courts, cannot be sued in the same manner that non-residents may be sued.

Leeper v. Texas, 139 U. S., 462, 468.

In Iowa Cent. R. Co. v. Iowa, 160 U. S., 389, it is said:

"It is not a right, privilege or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another.

Provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, the question of whether it is by a motion or ordinary action in no way renders the proceedings not due process of law."

Lowe v. State, 163 U. S., 81.

A. T. & S. F. Ry. Co. v. Matthews, 174 U. S., 96.

In fact, plaintiff in error cannot complain that he, as such, or the estate in his charge, is discriminated against by such law. The statute which authorizes suit against him as a non-resident gives him like right to sue, and no discrimination is made in that respect. But the claim is made that if a resident administrator should be appointed, the entire estate within

the State of Kansas would be applied *pro rata* in payment of debts of the deceased. But the entire estate, and no more, may also be appropriated by attachment if it is in charge of the non-resident executor. The statute, therefore, does not discriminate against the estate or the beneficiaries thereof, and such discrimination, if any, is against some of the creditors of the estate only, and, as such creditors may cause local administration of such estate, they may not complain that such statute denies to them the equal protection of the laws.

But the non-resident executor cannot be heard to make such objection for such other creditors. It was so held as to the Hull Coal & Coke Co., of Virginia in

Blake v. McClung, 172 U. S., at 259.

Kansas City v. Union Pacific Ry. Co., 176 U. S., 114.

Sully v. Amn. N. Bk., 178 U. S., 289.

Long v. Forest, 23 L. R. A., 33, and note.

The complaint made by plaintiff in error, when analyzed, is, not that he is discriminated against, for as shown, he is not; nor that the estate is discriminated against, for it is not, as it may be appropriated in payment of debts, *pro rata* in case of local administration, or in the order of levy in case of local attachment against a non-resident executor, but the com-

plaint is that other creditors of the estate, if there be any, may be discriminated against.

The plaintiff in error cannot escape just liability under such pretext or claim.

Such amendment was not intended to prevent a state from arranging and parceling out the jurisdiction of its several courts as it sees fit.

Bowman v. Lewis, 101 U. S., 22, *supra.*

The Pres. etc. v. Lowery, 93 U. S., 72, *supra.*

McCready v. Commonwealth, 94 U. S., 391.

Robinson v. Ocean Steam Navigation Co., 112 N. Y., 315, *supra.*

Haney v. Marshall, 9 Maryland, 194, *supra.*

Hayes v. Mo., 120 U. S., 68, *supra.*

The plaintiff in error was not deprived of property without the process of law.

The action was duly commenced and prosecuted with personal appearance of the defendant and with all of the forms and solemnities

of judicial proceedings provided by the constitution and laws of the state, and in all respects as every other controversy between individuals concerning property and property rights are tried and determined in that state.

"Due process of law" and "the law of the land" are synonymous, and by such terms it is clearly intended that reference is had to the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.

Cooley Const. Lim., 353.

Hovey v. Elliott, 167 U. S., at 418.

Rearson v. Yewdell, 95 U. S., 294.

Blake v. McClung, 172 U. S., 254 at 257.

Sully v. Am. Nat'l Bank, 178 U. S., at 302.

Campbell v. Holt, 115 U. S., 620.

Provident Inst. etc. v. Jersey City, 113 U. S., 506.

Arrowsmith v. Harmoning, 118 U. S., 194.

Central Land Co. v. Laidley, 159 U. S. 103.

It is not contended by defendant in error that an "executor" is not a person "within the meaning of the constitutional provision forbidding the deprivation of property without due process of law or the denial of the equal protection of the law. The claim is that he is not a 'citizen' of a state or of the United States within the provision entitling him to and prohibiting the denial to him of all the privileges and immunities of citizens of the several states and of the United States."

Blake v. McClung, 172 U. S., at 259.

The remaining errors as specified and urged are the claimed errors of the Supreme Court of the State of Kansas in affirming the decision and judgment of the District Court of Atchison County, and the answers to the claimed errors of the District Court as hereinbefore presented fully meet the objections so made by the plaintiff in error. As the decision of the District Court was correct under the authorities above cited, it follows that the decision of the Supreme Court affirming the same, was also correct.

Even if the judgment of the District Court was erroneous upon such constitutional grounds as urged, the original judgment of that court was decisive of the case and concluded the plaintiff in error as to his supplemental motions and the judgment of the Supreme Court in this case was not erroneous. Such judgment of the Dis-

trict Court not having been appealed from or, what is the same thing, the appeal therefrom having been dismissed, and its judgment permitted to stand, the law of *res adjudicata* applies thereto with full force, and the Supreme Court upon such rule alone, should have rendered the decision in this case which it did render and from which the writ of error issued to this court.

If the case is considered upon its merits we urge that the decision of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

JACKSON & JACKSON,
Attorneys for Defendant in Error.

HORACE M. JACKSON AND
JAMES F. TUFTS
of Counsel.